Filed 8/27/19 Komin v. Travelers Property Casualty Insurance Co. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MICHAEL KOMIN,

Plaintiff and Appellant,

v.

TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY,

Defendant and Respondent.

F075381

(Super. Ct. No. S1500CV279251)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Ball & Bonholtzer and Stephen C. Ball; Law Offices of James B. Kropff and James B. Kropff for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, John T. Brooks, Matthew G. Halgren, and Suzanne Y. Badawi for Defendant and Respondent.

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Appellant Michael Komin (Komin)[1] was sued by his neighbors, Bob[2] and Carol Grayson and their son Bob Grayson, Jr. (Bob, Jr.), for recovery of tort damages resulting from an assault and battery allegedly perpetrated by Komin against the Graysons (the Grayson lawsuit). According to the Grayson lawsuit, Bob and Carol Grayson went to Komin's home and knocked on the front door to discuss the dangerous driving habits of Komin's sons when Komin pushed them out into the front yard where they both fell, repeatedly kicked and hit Bob Grayson while the latter was on the ground, demanded they both leave the property and threatened the Graysons (including the arriving Bob, Jr.) with a double-barrel shotgun. Komin tendered the Grayson lawsuit to his homeowners' insurance company, Travelers Property Casualty Insurance Co. (Travelers). The homeowners' insurance policy issued by Travelers included liability coverage for damage claims caused by an occurrence, which the policy defined as an *accident*. Based on its assessment that the Grayson lawsuit was founded on Komin's intentional conduct rather than on an accident, Travelers denied coverage. In response, Komin commenced the present action against Travelers, alleging that Travelers breached its duty to defend. Travelers moved for summary judgment on the ground the undisputed facts (including the terms of the homeowners' insurance policy, the allegations of the Grayson lawsuit and other extrinsic facts) established it had no duty to defend Komin concerning the Grayson lawsuit because Komin's conduct was not an accident. The trial court agreed and granted the motion for summary judgment. Komin appeals from the resulting judgment. We hold the trial court correctly concluded that Travelers did not breach its duty to defend. Komin's use of physical force, violence and wielding a shotgun, which

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1 We refer to Michael Komin as Komin, except when it is helpful in our discussion to include his first name for clarity's sake to distinguish him from his wife.

2 Bob Grayson is also occasionally referred to in the record as Bob, Sr., or as Grayson, Sr., to distinguish him from his son, Bob, Jr.

conduct constituted the crux of the injury-causing events in this case, cannot reasonably be deemed an accident. Accordingly, the judgment of the trial court is hereby affirmed.

FACTS AND PROCEDURAL HISTORY

The Grayson Lawsuit

On December 29, 2011, the Graysons filed their first amended complaint against Komin, setting forth causes of action for (1) elder abuse, (2) assault with a deadly weapon, and (3) intentional infliction of emotional distress. The first amended complaint, referred to herein as the Grayson lawsuit, states that on September 11, 2011, Bob and Carol Grayson went to the home of their neighbor, Komin, to discuss the dangerous and disruptive behavior of Komin's children in driving their off-road motor vehicles. According to the Graysons' allegations, the following events then took place:

> "6. … During this discussion, KOMIN pushed GRAYSON, SR., an elder, to the ground. When CAROL GRAYSON tried to step between KOMIN and GRAYSON, SR., KOMIN pushed CAROL GRAYSON to the ground as well. KOMIN began kicking GRAYSON, SR. and hitting him as he lay on the ground resulting in cuts to GRAYSON SR.'s face, hands and arms. CAROL GRAYSON received injuries to her face and hands, including a wound the Kern County's Sheriff's Incident Report described as bleeding 'severely' from her right hand. GRAYSON, SR., then called his son, BOB GRAYSON, JR. on his cell phone to come to their aid. BOB W. GRAYSON, JR. arrived soon after and witnessed KOMIN'S intentional and malicious actions threatening great bodily harm to the [GRAYSONS] and each of them.
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> "7. While KOMIN shouted obscenities at the GRAYSONS to get off his property, KOMIN went into his house and returned with a shotgun which he pointed at all of the GRAYSONS while shouting that if they did not get off his property he would kill them. [¶] … [¶]
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> "12. The elder abuse, intentional and willful assault and battery conduct occurred at said date and location, and included but was not limited to attacking, kicking, pushing and threatening in a fit of uncontrollable rage to kill BOB W. GRAYSON, SR. AND CAROL GRAYSON with a double barrel Parker Bros. D shot gun, pointed at their heads. [¶] … [¶]

> "17. On September 11, 2011 … KOMIN threatened to kill with a loaded double barrel … shot gun, … BOB W. GRAYSON SR., CAROL GRAYSON and BOB W. GRAYSON, JR. [The GRAYSONS] were unarmed and caused no threat of injury to … KOMIN that prompted any action of self-defense. In fact, KOMIN had pushed GRAYSON, SR. and CAROL GRAYSON to the ground causing injury. [¶] … [¶]
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> "19. Said assault with a deadly weapon occurred by … KOMIN acting in a threatening, menacing and dangerous manner toward [the GRAYSONS] and each of them, causing them to fear for their lives."

In their prayer for relief, the Graysons requested, among other things, recovery of general damages according to proof, medical and incidental expenses according to proof, and punitive damages.

Komin Tenders the Defense of the Grayson Lawsuit to Travelers

On January 31, 2012, Komin notified Travelers of the lawsuit filed against him by the Graysons arising out of the September 11, 2011 altercation. A copy of the Grayson lawsuit was provided to Travelers the following week, on February 6, 2012. Komin tendered the Grayson lawsuit to Travelers at that time, seeking a defense of the lawsuit pursuant to Komin's (and his wife's) homeowners' insurance policy.

Terms of Travelers's Policy

Travelers had issued a homeowners' insurance policy that included liability coverage to Michael Komin and his wife, Roxann Komin (the policy). However, as reflected in the policy's coverage provisions, liability coverage was only available if a claim was made or a suit was brought against Michael or Roxann Komin for damages caused by "an *occurrence* to which this coverage applies." (Italics added.) The policy specifically defined an occurrence to mean "an *accident*." (Italics added.) Further, in the policy's exclusion provisions, the policy expressly excluded coverage for bodily injury or property damage "which is expected or intended by any insured."

Travelers Investigates Komin's Claim

Karen Plumlee, a Senior Technical Specialist at Travelers, was assigned by Travelers to handle Komin's claim that Travelers should provide a defense of the Grayson lawsuit. Plumlee was personally involved in Travelers's investigation of Komin's request for a defense of said lawsuit.

On February 2, 2012, Plumlee called the Komin residence and left a voicemail asking for a return call regarding the insurance claim. On February 6, 2012, Plumlee called the Komin residence again, and was able to reach Michael Komin's wife, Roxann Komin. Plumlee asked Roxann Komin what had happened on the date of the incident. Roxann Komin explained that the Graysons do not like the noise generated when her sons ride their motorcycles behind the Graysons' property. She told Plumlee that on the date of the incident, her kids were riding an off-road vehicle on an orchard road down the side of the Graysons' property. She said Bob Grayson was very upset about it, and he came over to the Komins' home and was yelling and belligerent, making it necessary for Michael Komin to call the sheriff. Roxann Komin also told Plumlee that sometime after the incident, the Graysons allegedly turned off the well water connection to the Komins' property, which property shared a well with several neighbors including the Graysons.

On February 6, 2012, Roxann Komin provided Plumlee a copy of the Grayson lawsuit. Plumlee reviewed the allegations of the Grayson lawsuit, noting that it included three causes of action for intentional wrongdoing, including elder abuse, assault with a deadly weapon and intentional infliction of emotional distress. Plumlee reviewed the specific factual allegations made by the Graysons in their pleading, which included allegations that (1) Michael Komin pushed Bob Grayson to the ground, and when Carol Grayson tried to step in, he pushed her to the ground as well; (2) Michael Komin began kicking Grayson as he lay on the ground; (3) Both Bob Grayson and Carol Grayson sustained physical injuries from the altercation; (4) Bob, Jr. arrived at the scene; (5) Michael Komin shouted obscenities at the Graysons to get off his property, then he

went into his house and returned with a shotgun and pointed it at the Graysons, shouting that if they did not get off his property, he would kill them.

In her investigation, Plumlee next contacted the Graysons' attorney, Susan Ghormley, on February 6, 2012. Ghormley informed Plumlee there was a police report and a video taken by Roxann Komin on her cell phone. On February 6, 2012, Plumlee also called Michael Komin's attorney, Greg Hulbert. Hulbert was aware of the allegations of the Grayson lawsuit, but he did not have a copy of the police report and he did not have any further information at that point beyond what was alleged in the lawsuit.

On February 8, 2012, Plumlee received a copy of the police report from Ghormley. Plumlee reviewed the police report and "observed that [Michael] Komin and Mrs. Komin had provided detailed, contemporaneous statements to the police at the time of the altercation on September 11, 2011." Plumlee further observed that "other witnesses to the events also provided statements to the police, that were set forth in the police report." In her investigation, Plumlee considered the statements provided to the police by the Komins, the Graysons, and other neighbors.

The Police Report

According to the police report, Michael Komin "admitted he pushed [Bob] Grayson, Sr. and Carol into the front yard and they fell down." Additionally, although Michael Komin denied kicking Bob Grayson while he was on the ground, Komin "admitted brandishing his shotgun," stating the Grayson family would not leave his property and he had a right to defend his home. The police report noted that Bob Grayson was 72 years old, while Michael Komin was 40 years old.

The police report included the accounts provided by both Bob and Carol Grayson to the investigating sheriff's deputies, also referred to herein as the police.[3] The

[3] We follow the parties' usage of the common term "police report" in describing the "Incident/Investigation Report" prepared by officers of the Kern County Sheriff's Department.

Graysons told the police they had gone over to Komin's residence to talk to Komin about his sons' dangerous driving. Bob and Carol Grayson were upset because, according to Carol, the Komin kids had nearly run her over on the dirt road adjacent to her property. According to Bob and Carol Grayson's accounts to police, after they knocked on Michael Komin's front door, Michael Komin pushed both Bob and Carol Grayson out of the house and to the ground, Komin repeatedly kicked and hit Bob Grayson while Bob was on the ground, and then Komin brandished a double-barrel shotgun with threatening words that everyone must "get off his 'fu**ing property or he was going to kill them.'"

The police also interviewed neighbors George and Barbara. According to the police report, Barbara and her husband heard yelling coming from the Komin residence. Barbara walked over to the house to see what was going on and saw Bob Grayson and Michael Komin in a physical fight. She said Komin was kicking and hitting Bob Grayson while Grayson was on the ground. When she could not break it up or convince Komin to stop kicking Grayson, Barbara went back to her residence to call the Kern County Sheriff's Department to report the incident. Barbara returned to the Komin residence to find Komin holding a shotgun and yelling at everyone to get off his property or else he was "going to 'fu**ing kill everyone.'" George also saw Bob Grayson "'getting his ass kicked'" by Michael Komin. He said he saw Bob Grayson laying on the ground and Komin was kicking and hitting him with his fists. At that point, George called 911. He called 911 a second time when he observed that Komin had a shotgun.

The police report also documented the contents of the video taken by Roxann Komin. According to the police report, the video included footage of Michael Komin standing over Bob Grayson and yelling at him. The video also included footage of Michael Komin telling everyone to get off his property. It also shows him entering his

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For convenience, we also generally follow the practice of the parties in referring to the sheriff's deputies as the police.

house and returning with a shotgun and again yelling at everyone to get off his property. The officer who summarized the video content then noted, "I can hear someone say, 'I'm going to kill you,' but I cannot determine who it is between [Michael Komin] and the GRAYSONS."

Travelers's Denial Letter and Request for Further Information

On February 15, 2012, after reviewing the Grayson lawsuit, the police report and witness statements, and after speaking with both Roxann Komin and Michael Komin's attorney, Travelers (through Karen Plumlee, its claims specialist) informed the Komins by letter that it was denying coverage.

In denying coverage, Travelers's letter summarized the nature of the conduct involved: "The facts of which we are aware are that this matter arises from an altercation between Mr. Komin and the Graysons which occurred on September 11, 2011, which was initiated when Bob Grayson, Sr. and his wife, Carol came to your property … to discuss a prior incident involving your children's use of an off road vehicle on a nearby easement road.… [T]he police report and witnesses confirm that when the Graysons knocked at your door, a verbal altercation ensued and a physical altercation followed. While you claim you were defending your property, witness testimony confirms that Mr. Grayson was pushed down in your yard (and not on your porch) and that when Mrs. Grayson tried to defend her husband, she was pushed to the ground as well and that you then commenced kicking and punching Mr. Grayson while he was on the ground. When he arose and attempted to retreat, you went into your home and retrieved a shotgun and then pointed it at the Graysons and their son, Bob Grayson, Jr. who arrived on the scene. This is what is claimed in the Complaint and is confirmed in the police report by witnesses George and Barbara …. [¶] The Complaint contains causes of action for abuse of an elder, assault with a deadly weapon and intentional infliction of emotional distress …."

The denial letter stated: "On behalf of Travelers, we must respectfully decline your request of defense and indemnity in connection with [the Grayson lawsuit]." The

letter explained that coverage was being denied because (1) the policy only provides liability coverage for a suit or claim for damages caused by an "occurrence," which is defined as an "accident" and (2) the Grayson lawsuit unequivocally arises out of intentional, nonaccidental conduct that falls outside the definition of "'occurrence.'"

In its February 15, 2012, denial letter, Travelers expressly invited Komin to provide any additional facts or theories that might have a bearing on the duty to defend, and Travelers promised to reevaluate its decision in light of any such additional information.

Komin's Attorney Letter

Approximately six months later, on August 14, 2012, Komin's attorney sent a letter asking Travelers to reconsider its position. The letter presented Komin's modified version (*post* police report) of what happened: That when Bob and Carol Grayson came to the front door of Komin's home, Bob Grayson was belligerent and started to grab or hit Komin, so it became necessary, in self-defense, for Komin to "take Mr. Grayson to the ground" to protect himself. The attorney's letter further stated that, according to Komin, once Bob Grayson was on the ground, Bob Grayson's wife attempted to hit Komin, but she slipped and fell in the process and scratched her hands on the stucco wall of the house. Komin's attorney further stated Komin's view that it was after Bob, Jr. joined in his parents' attack and made threats, that Komin found it necessary to retrieve his shotgun.

Through its in-house attorney, Travelers responded to the letter from Komin's attorney. Travelers indicated Komin's assertion that his actions toward the Graysons were motivated by self-defense did not create accidental conduct on his part. Since the letter from Komin's attorney did not present any facts triggering coverage, Travelers stood by its prior denial. Travelers again invited Komin to provide any additional facts that may have a bearing on its decision to deny coverage.

The Graysons File and Abandon a Second Amended Complaint

In the month prior to the scheduled trial date of the Grayson lawsuit, the Graysons filed a second amended complaint that included purportedly new claims entitled negligence and negligent infliction of emotional distress. In light of the amended pleading, Komin's attorney sent a renewed request to Travelers to reconsider its coverage decision, asking Travelers to provide a defense of the lawsuit based on the fact that the amended pleading now included allegations of negligence. Travelers responded that mere inclusion of a claim captioned or labeled as negligence does not create coverage unless there are facts alleged that are consistent with negligent conduct. Travelers noted there were no new facts and the basis for the lawsuit continued to be the deliberate and intentional conduct on Komin's part as set forth in the prior version of the pleading. That is, no facts were alleged indicating Komin's conduct constituted *an accident*. Consequently, Travelers continued to deny coverage relating to the Grayson lawsuit.

Jury Finds for Komin in Grayson Lawsuit

By the time of trial of the Grayson lawsuit in late January 2013, the purported negligence claims were abandoned by the Graysons because the special verdict form presented to the jury only included allegations of intentional tort causes of action against Komin. The jury reached its verdict on February 6, 2013. In the special verdict, the jury found in favor of Komin on each of the Graysons' claims of intentionally caused wrongdoing.

Komin Commences the Present Action Against Travelers

On April 29, 2013, Komin filed the present action against Travelers for breach of the insurance contract and breach of implied covenant of good faith and fair dealing, seeking declaratory relief and monetary damages. Komin alleged, among other things, that Travelers breached its duty under the policy to defend Komin in the underlying Grayson lawsuit. He also alleged that Travelers failed to adequately investigate prior to denying coverage. Travelers filed its answer to the complaint on May 28, 2013.

Travelers's Motion for Summary Judgment and/or Adjudication

On July 28, 2016, Travelers filed its motion for summary judgment and/or summary adjudication against Komin (the motion for summary judgment), contending the entire action or alternatively certain claims thereof were without merit under the undisputed facts. Travelers's notice of motion indicated that the motion for summary judgment was based on several related grounds, including: (a) The policy only provided liability coverage for claims resulting from an *accident*, not intentional conduct, and the conduct here was not an accident and (b) Even if Komin was potentially acting in self-defense, his aggressive or violent conduct carried out against the Graysons remained purposeful and intentional regardless of the reason or motivation for his conduct, thus it was not an accident (citing the California Supreme Court case of *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302 (*Delgado*)).

On September 27, 2016, Komin filed his opposition to the motion for summary judgment. Among other things, Komin's opposition argued Travelers had inadequately evaluated whether it had a duty to defend because it failed to consider, separately and distinctly, Bob Grayson's claim, Carol Grayson's claim and Bob, Jr.'s claim. For example, according to Komin's opposition, extrinsic facts showed Carol Grayson's claim involved a potential accidental injury. Komin also pointed out that if any of the claims were potentially covered, all of them were. Additionally, Komin's opposition asserted Travelers failed to adequately conduct its investigation before denying coverage, since it relied on Komin's statement to law enforcement set forth in the police report without personally interviewing him about the incident.

Travelers filed a reply and also submitted evidentiary objections to several of the declarations filed by Komin in his opposition to the motion.

On January 13, 2017, the trial court issued its order granting Travelers's motion for summary judgment. Explicitly relying on *Delgado*, *supra*, 47 Cal.4th 302, the trial

court explained: "[Travelers] carried its burden of proof that there is no triable issue of material fact that [Travelers] was not obligated under the contract to provide [Komin] with a defense to the intentional conduct of [Komin]. All the facts show that … Komin's acts were intentional. Self defense does not make his actions accidental." Additionally, the trial court stated in its order that Komin's opposing separate statement of undisputed facts (or separate statement) failed to set forth specific facts creating a triable issue of material fact. In so ruling, the trial court also sustained Travelers's evidentiary objections to several of the declarations presented by Komin in support of his opposition to the motion.

Based on its order granting summary judgment, the trial court entered judgment in favor of Travelers on February 2, 2017. Komin timely filed his notice of appeal from the judgment.

DISCUSSION

I. Standard of Review

A defendant may move for summary judgment if it is contended the action has no merit. (Code Civ. Proc., § 437c, subd. (a)(1).) Summary judgment is appropriate when all of the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (*Id.*, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) On appeal, we review the correctness of the trial court's ruling de novo, applying the same legal standard as the trial court. (*Havstad v. Fidelity National Title Ins. Co*. (1997) 58 Cal.App.4th 654, 658.) That is, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) Finally, as to rulings on evidentiary objections, we apply the abuse of discretion standard

of review. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 (*Alexander*).)

On a summary judgment motion where, as here, an insurer seeks to prevail on the ground that it did not have a duty to defend its insured against a third party lawsuit, the insurer must present undisputed facts establishing the absence of any potential for coverage. Whereas, the insured defeats such a motion by showing a potential for coverage exists—i.e., that the underlying claim *may* fall within policy coverage. (*Albert v. Mid-Century Ins. Co*. (2015) 236 Cal.App.4th 1281, 1290 (*Albert*); *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose*).)

II. Overview of Duty to Defend

The primary issue in the instant appeal is whether Travelers had a duty to provide a defense to its insured, Komin, of the Grayson lawsuit. We briefly summarize the relevant legal principles bearing on an insurer's duty to defend.

A liability insurer owes a duty to defend its insured against claims creating a potential for indemnity under the insurance policy. (*Albert*, *supra*, 236 Cal.App.4th at p. 1289.) "'"[T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy."'" (*Montrose*, *supra*, 6 Cal.4th at p. 295.) The duty to defend is broader than the duty to indemnify and, thus, the duty to defend may exist even where coverage is in doubt and ultimately does not develop. (*State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577 (*Frake*).)

A duty to defend a claim due to a potential for coverage under the policy may arise (a) from the nature of the allegations in the third party complaint and *also* (b) from "facts known to the insurer and extrinsic to the third party complaint." (*Montrose*, *supra*, 6 Cal.4th at p. 296.) Consequently, "an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.)

As summarized by the Supreme Court in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc*. (2014) 59 Cal.4th 277 (*Hartford*): "'Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. [Citation.] But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered.' [Citation.] This includes all facts, both disputed and undisputed, that the insurer knows or '"becomes aware of"' from any source [citation], 'if not "at the inception of the third party lawsuit," then "at the time of tender"' [citation]. 'Moreover, that the precise causes of action pled by the third party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability.'" (*Id*. at p. 287.) Thus, if any facts alleged in the complaint or fairly inferable from the same, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises. (*Ibid*.) In general, doubts as to whether an insurer owes a duty to defend must be resolved in favor of the insured. (*Ibid*.)

While the duty to defend is broad, it is not unlimited; it is measured by the nature and kinds of risks covered by the policy. (*Waller v. Truck Ins. Exchange, Inc*., *supra*, 11 Cal.4th at p. 19.) Here, the kinds of risks covered by the policy were accidents.

III. Case Law Definition of the Term "Accident" in Liability Policy

As noted, Travelers's policy covers liability claims resulting from an occurrence, and the term "occurrence" is defined as an *accident*. Since the basis of Travelers's motion for summary judgment was that Komin's conduct was not an accident, we shall consider the meaning of the term "accident" in the liability insurance context.

California appellate courts have provided needed definition and elaboration of the term "accident" as used in coverage provisions of liability insurance policies. In that connection, it is well established that "an accident is '"an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."'"

(*Delgado, supra*, 47 Cal.4th at p. 308.) Furthermore, "the word 'accident' … refers to the conduct of the insured for which liability is sought to be imposed on the insured." (*Id*. at p. 311.) It "refers to the injury-producing acts of the insured, not those of the injured party." (*Id*. at p. 315.)[4]

As a result of the foregoing definitional standards, no accident occurs where the injury-producing conduct by the insured was deliberate and calculated, regardless of his or her motivation. (*Hogan v. Midland National Ins. Co*. (1970) 3 Cal.3d 553, 560.) Such intentional conduct is not an accident, even if the harm caused was unintended. (*Albert, supra*, 236 Cal.App.4th at pp. 1290–1291; *Frake, supra*, 197 Cal.App.4th at pp. 579–581; *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 600 (*Quan*); see *Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388, 395 ["the term 'accident' refers to the nature of the conduct itself rather than to its consequences"].) "'Because the term "accident" refers to the insured's intent to commit the act giving rise to liability, as opposed to his or her intent to cause the consequences of that act, the courts have recognized—virtually without exception—that deliberate conduct is not an "accident" or "occurrence" irrespective of the insured's state of mind.'" (*Dalrymple v. United Services Auto. Assn*. (1995) 40 Cal.App.4th 497, 521, quoting *Collin, supra*, 21 Cal.App.4th at p. 810; accord, *Swain v. California Casualty Ins. Co*. (2002) 99 Cal.App.4th 1, 10 ["We know of no case from this or any other jurisdiction where a harm knowingly and

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4 In his appeal, Komin suggests that under Travelers's policy the term accident is nonspecific and need not refer to the conduct of the insured. That is not correct because, as noted, California courts, including *Delgado*, have provided needed specificity to the meaning of the term "accident" as used in a liability policy. As *Delgado* clearly stated, "Under California law, the word 'accident' in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured." (*Delgado, supra*, 47 Cal.4th at p. 311; see *Collin v. American Empire Ins. Co*. (1994) 21 Cal.App.4th 787, 810 [common law construction of the term "accident" becomes part of the policy and precludes any assertion that the term is ambiguous] (*Collin*).)

purposefully inflicted was held 'accidental' merely because the person inflicting it erroneously believed himself entitled to do so."].)

At the same time, it should be noted that coverage is not necessarily precluded in every instance where an insured engaged in an intentional act. (*Quan*, *supra*, 67 Cal.App.4th at p. 598.) In applying the above definition of accident, courts have stated that "'"[a]n accident does not occur when the insured performs a deliberate act *unless* some additional, unexpected, independent, and unforeseen happening occurs that produces the damage."'" (*The Travelers Property Casualty Co. of America v. Actavis, Inc*. (2017) 16 Cal.App.5th 1026, 1038, italics added (*Actavis, Inc.*); accord, *Frake*, *supra*, 197 Cal.App.4th at p. 579; *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50.) Thus, if some "'unexpected, independent, and unforeseen happening'" intervenes in the causal series of events to produce the resulting harm, an accident may be deemed to have occurred notwithstanding the insured's intentional conduct. (*Frake*, *supra*, at p. 580.) As expressed in *Merced Mutual Ins. Co v. Mendez* at page 50, "an 'accident' exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." However, where the insured intends the acts resulting in the injury or damage, the acts may not be deemed an accident merely because the insured did not intend to cause injury. (*Albert*, *supra*, 236 Cal.App.4th at p. 1291; *Fire Ins. Exchange v. Superior Court*, *supra*, 181 Cal.App.4th at p. 392; *Merced Mutual Ins. Co v. Mendez*, *supra*, at p. 50.)

Finally, because of its relevance to this case, we note the holding and analysis of the Supreme Court in *Delgado*. In *Delgado*, an injured party sued the insured for assault and battery, alleging the incident fell within the insurance policy's coverage of an accident because the insured had acted under an unreasonable belief he had to defend himself. (*Delgado*, *supra*, 47 Cal.4th at p. 305.) The Supreme Court concluded the incident did not constitute an accident, even if the insured believed he was acting in self-defense. (*Id*. at p. 317.) In reaching that conclusion, the court observed that "[i]n the

context of liability insurance, an accident is '"an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause."'" (*Id*. at p. 308.) Since the injury-producing event in that case—i.e., the insured's act of assault and battery—was intended by the insured and was not alleged to be merely a result of a reflex action or shielding, the injuries sustained were not accidental. (*Id*. at pp. 311–312.) "[A]n injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor." (*Ibid*.) This would be the case even if the insured believed his conduct was justified: "[A] purposeful and intentional act remains purposeful and intentional regardless of the reason or motivation for the act." (*Id*. at p. 314.)

For these reasons, the court rejected the argument that an insured's mistaken belief in the need for self-defense could potentially convert the assault into an accidental act. The court further explained: "Here, [the plaintiff's] complaint alleges acts of wrongdoing by the insured against him. Those are the acts that must be considered the starting point of the causal series of events, not the injured party's acts that purportedly provoked the insured into committing assault and battery on [the plaintiff]. The term 'accident' in the policy's coverage clause refers to the injury-producing acts of the insured, not those of the injured party." (*Delgado, supra,* 47 Cal.4th at p. 315.) The court then concluded as follows: "[A]n insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into 'an accident' within the policy's coverage clause" and, accordingly, the insurance company had no duty to defend its insured in a lawsuit brought against him by the injured party. (*Id*. at p. 317.)

IV. Travelers's Motion Established There Was No Duty to Defend

As we have noted, the determination of a duty to defend depends, in the first instance, on a comparison of the allegations of the complaint and the terms of the policy. (*Hartford, supra,* 59 Cal.4th at p. 287.) We also consider whether extrinsic facts known

to the insurer suggested the claim may be covered. (*Ibid*.) Thus, if any facts (1) alleged in the complaint or fairly inferable from the same or (2) otherwise known or discovered by the insurer, suggested a claim potentially covered by the policy, the insurer had a duty to defend. (*Ibid*.) Generally, the relevant extrinsic facts would be those known to the insurance company at the time of tender of the claim for coverage. (*Ibid*.; see *Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1230–1231 [courts look to the extrinsic facts available to the insurer at the time the insured tenders its claim for a defense].) On a summary judgment motion, to prevail on the duty to defend issue, a defendant insurance company such as Travelers must establish the absence of any potential for coverage. (*Albert, supra,* 236 Cal.App.4th at p. 1290.)

Here, the policy language provided liability coverage only for claims or suits for personal injury or damages resulting from an "occurrence," which was defined as an "accident." In part III. of this opinion, we outlined at length the case law definition of the term "accident" in liability insurance policies, including that an accident does not include deliberate or intentional conduct on the part of the insured resulting in harm. Travelers's motion for summary judgment sought to establish the lack of an accident and, hence, the absence of a duty to defend under the factual allegations of the Grayson lawsuit and other extrinsic facts known to Travelers. For reasons explained below, Travelers succeeded in that regard.

We begin with the factual allegations of the Grayson lawsuit tendered to Travelers by Komin. The crux of that pleading was that Komin committed assault and battery against the Graysons, and the relevant factual allegations thereof included such intentional conduct as pushing Bob and Carol Grayson to the ground, kicking Bob Grayson, and threatening the Graysons (including Bob, Jr.) with a double-barrel shotgun. Thus, the Grayson lawsuit clearly and conspicuously presented the intentional or deliberate nature of Komin's conduct, with no facts suggesting that an accident occurred.

In addition to the facts alleged in the Grayson lawsuit, Travelers also became aware of and considered the contents of the police report. It is obvious that the matters presented in the police report would have reasonably tended to confirm or corroborate to Travelers the intentional nature of Komin's conduct. As noted, according to the police report, Komin "admitted he pushed [Bob] Grayson, Sr. and Carol into the front yard and they fell down." Additionally, although Komin denied kicking Bob Grayson while he was on the ground, Komin "admitted brandishing his shotgun," stating the Grayson family would not leave his property and he had a right to defend his home.

Bob and Carol Grayson's statements set forth in the police report were substantially the same as the material factual allegations in their lawsuit against Komin. Moreover, the police report summarized the witness accounts of neighbors George and Barbara, both of whom confirmed that Komin had repeatedly kicked Bob Grayson while the latter was on the ground and that Komin threatened the Graysons with a shotgun. The police report also documented the contents of the video taken by Roxann Komin, which video was generally consistent (or at least not inconsistent) with the Graysons' account of what happened. Finally, the police report also provided follow-up information about physical injuries sustained by Bob and Carol Grayson. Bob Grayson's injuries were reported to include bruising of his ribs and back; Carol Grayson's injuries included injury to her hand or arm, and pain in her neck and back. Based on the foregoing summary of the police report's contents, it is clear the police report and information contained therein reasonably confirmed the intentional nature of Komin's conduct.

According to Travelers's moving papers in its motion for summary judgment, and as supported by the declaration of its claims specialist (or adjuster), Plumlee, Travelers made its decision to deny coverage based on (1) the allegations of the Grayson lawsuit and (2) the other extrinsic evidence of which it was aware, including "Travelers' adjuster's initial interview with [Roxann] Komin, discussion with [Michael] Komin's counsel, review of [Michael] Komin's statement to the police, review of the other witness

statements provided to the police, and review of the video recording transcription and other information in the police report," because all those sources of information revealed only intentional, nonaccidental conduct by Komin.[5] Travelers's denial letter was sent to Komin on February 15, 2012, explaining the basis for denial.

Travelers's motion for summary judgment also included the additional extrinsic information learned after the denial letter, including the August 2012 letter received from Komin's attorney, which characterized Komin's conduct as self-defense. However, as argued by Travelers, under *Delgado* it does not matter whether Komin may have been acting in self-defense. An assault does not become an accident merely because it was an act of self-defense. (See *Delgado, supra*, 47 Cal.4th at pp. 315–317.) As correctly noted by Travelers, even though a claim of self-defense may vitiate legal liability for an intentional act, *Delgado* confirms it does not convert the act itself into an accident for purposes of a liability insurance policy. We conclude Travelers's showing in support of its motion for summary judgment was sufficient to prima facie establish the lack of an accident on the part of the insured and, therefore, the absence of a duty to defend.

Komin's opposition to the motion for summary judgment included declarations of Michael Komin and Roxann Komin. Michael Komin's declaration admitted he pushed Bob Grayson out onto the lawn, but he said he did not kick or hit Bob Grayson. He said he "[did] not know" how Bob Grayson may have sustained his injuries. Further, and

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5 In connection with its motion for summary judgment, Travelers acknowledged it was submitting the adjuster's notes from the claim file to show that certain information was received by the adjuster, not to prove the truth of what her notes otherwise described. On appeal, Komin claims the trial court transgressed this agreed limitation, but Komin has failed to establish that contention. In any event, as we explain herein, summary judgment was properly granted in this case based on the allegations of the Grayson lawsuit and the extrinsic information known to the insurer. Such extrinsic information included, among other things, the police report itself. Of course, the mere fact that such extrinsic facts were considered by Travelers in its coverage decision, by the trial court in its ruling, or by this court in the present appeal, should not be taken as a determination the extrinsic sources of information (such as witness statements in the police report) were necessarily true in what they reported.

contrary to what the police report stated of his initial account of events, Komin's declaration asserted he did not actually push or touch Carol Grayson, but she tripped when attempting to intervene in the altercation between Komin and Bob Grayson. Komin's declaration stated that while he was in the process of "trying to subdue" Bob Grayson, "Carol Grayson swung at me, missed and lost her balance," and he thought she may have scraped her arm on a stucco wall as she fell down. He admitted bringing out his shotgun, but he "[did] not believe" he pointed the gun "directly" at anyone. He noted he brought out the shotgun after he thought he saw Bob, Jr. approaching with what appeared to be a handgun. Michael Komin further declared he never spoke with anyone from Travelers to personally convey his version of what happened, and he added that if Travelers had asked him what happened, he would have told them. Roxann Komin's declaration in opposition to the summary judgment motion repeated the same assertions as were stated in her husband's declaration.[6] She added that when the woman from Travelers called, the woman did not ask specific questions about what happened that day.

Although the trial court sustained evidentiary objections to the Komins' opposition declarations, even if considered, the declarations of Michael and Roxann Komin do not alter the fundamental nature of Komin's intentional acts. Komin concedes in his declaration he pushed Bob Grayson, entered into an altercation with him (or subdued him) and also pulled out a shotgun. Again, if Komin's actions were in self-defense, which was the gist of Komin's declaration, that would not change the intentional and purposeful nature of his acts. Moreover, as we explain subsequently herein, even if it were true that Carol Grayson was not pushed but fell and scraped her hand in trying to intervene into the fray in which Komin was "subdu[ing]" her husband, such action on

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6 Other declarations were from Komin's defense attorney in the Grayson lawsuit and an insurance expert.

Carol Grayson's part would not transform Komin's intentional acts of physical force, aggression and wielding a shotgun into an accident for coverage purposes.

We conclude that Travelers made an adequate showing in its motion for summary judgment that there was no duty to defend because the intentional or deliberate nature of Komin's conduct leading to the Graysons' alleged damages did not constitute an accident for purposes of the insurance policy. Moreover, we agree with the trial court's assessment that nothing in Komin's separate statement of material facts (or opposing evidence referred to therein) created a triable issue of material fact regarding the nature of Komin's conduct or otherwise showed a potential for coverage.[7] Therefore, the trial court correctly granted Travelers's motion for summary judgment because there was no duty to defend the Grayson lawsuit.

As he did in the trial court, Komin's appeal presents several arguments that a potential for coverage existed and/or that Travelers failed to establish there was a lack of a potential for coverage under the policy. We consider these arguments below.

V. Komin's Contrary Arguments Are Unpersuasive

A. The Mixed-Action Argument

In *Buss v. Superior Court* (1997) 16 Cal.4th 35, 49, the Supreme Court held that in a mixed action (i.e., one alleging both potentially covered and uncovered claims), the insurer must provide a defense to the entire action. Based on this principle, Komin argues that if any of the claims by the individual Graysons, considered separately, were potentially covered, then the entire action had to be covered. This argument does not

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[7] At oral argument of this appeal, Komin's counsel stressed that the trial court's order mischaracterized or glossed over Komin's separate statement filed in opposition to the motion. However, our decision in this appeal is based on our de novo review of the pertinent record, not on the particular terms used by the trial court. Having conducted our de novo review, and as explained in this opinion, we hold the trial court's ultimate conclusion was correct that Travelers established the absence of a duty to defend and that Komin failed to present evidence demonstrating a triable issue of material fact regarding potential coverage.

assist Komin because even when the individual claims are considered separately, no potential for coverage is indicated.

1. Bob Grayson's Claim

There was clearly no accident on the part of Komin regarding the injuries to Bob Grayson. Even looking to Komin's sparse declaration in opposition to the motion for summary judgment, Komin's intentional conduct as reflected therein of pushing Bob Grayson onto the lawn, physically trying to "subdue" him, and of pulling out a shotgun were all intentional acts that cannot be deemed to be an accident. Komin's declaration refers to his deposition testimony, but that testimony similarly admits he pushed or knocked Bob Grayson down onto the grass and concedes that he, Komin, was "definitely" engaged in an altercation with Bob Grayson. He admits in his deposition to pulling out the shotgun while demanding that the Graysons leave the property, but he "[did] not really recall saying [he] was going to kill them." According to his declaration, he did not believe he "directly" pointed the shotgun at anyone. None of Komin's remarks indicate a potential for coverage. It is apparent from the allegations and extrinsic evidence that Komin's conduct was intentional, not an accident. Further, under applicable case law, the intentional nature of the injury-producing conduct is not altered by Komin's belief he acted in self-defense. (*Delgado*, *supra*, 47 Cal.4th at pp. 311–312, 314–317.)

2. Bob, Jr.'s Claim

The claim by Bob, Jr. likewise did not indicate a potential for coverage because neither the allegations of the Grayson lawsuit nor any known extrinsic facts suggested that Bob, Jr. was making a claim against Komin based on an accident. According to the allegations of the Grayson lawsuit, Komin intentionally brandished the gun at the Graysons, including Bob, Jr., while threatening to kill "each of them" if they did not leave. Since Bob, Jr. did not allege a physical battery, his claim was for infliction of emotional distress caused by Komin's threatening words in conjunction with wielding the

shotgun. As previously discussed, these allegations of the Grayson lawsuit did not reveal an accident, but only intentional conduct.

Turning to the extrinsic facts, in Komin's initial version of events as recorded in the police report, he admitted brandishing the shotgun while telling the Graysons to leave his property. In the version of events in Komin's declaration opposing the motion for summary judgment, Komin indicates that, while in the midst of his efforts to get the Graysons to leave his property and to subdue Bob Grayson, he observed Bob, Jr. approaching with what Komin believed may have been a handgun, so Komin went into the house and retrieved his shotgun, but he did not believe he directly pointed the gun at anyone.

The argument by Komin on appeal is apparently that if he merely pulled out a shotgun in the midst of a physical altercation, and/or acted in self-defense, but did not directly threaten anyone's life, there was at least a reasonable potential that he was not intending to cause traumatic fear or emotional distress to anyone (such as Bob, Jr.). In other words, if Bob, Jr. experienced emotional distress in witnessing what Komin was doing and saying, that should not be Komin's responsibility, since Komin purportedly did not intend that consequence.

We reject Komin's argument because the focus of inquiry is on the nature of the insured's acts, and not on the unintended consequences thereof. That is, the intentional nature of Komin's relevant conduct causing the alleged harm is not altered by the purported existence of unintended consequences. (*Albert, supra,* 236 Cal.App.4th at p. 1291 ["[t]he term 'accident' refers to the nature of the insured's conduct, and not to its unintended consequences"]; *Frake, supra,* 197 Cal.App.4th at p. 581, fn. omitted ["The mere fact that Frake did not intend to injure King does not transform his intentional conduct into an accident"]; *Quan, supra*, 67 Cal.App.4th at p. 600 ["An intentional act is not an accident [citation] even if it causes unintended harm"]; see *Fire Ins. Exchange v. Superior Court, supra*, 181 Cal.App.4th at p. 395 ["the term 'accident' refers to the

nature of the conduct itself rather than to its consequences"].) Moreover, in addition to the lack of an accident, coverage of this particular claim would be precluded for an additional reason. As correctly pointed out by Travelers, where (as here) the liability policy is limited to claims for bodily injury or property damage, it does not include coverage for emotional distress in the absence of physical injury. (*Aim Insurance Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 220; accord, *Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 521.)

3. Carol Grayson's Claim

Finally, Carol Grayson's claim did not trigger a duty to defend the Grayson lawsuit. Under the Grayson lawsuit, Carol Grayson alleged that Komin pushed her to the ground when she attempted to intervene between Komin and her husband. The extrinsic facts known to Travelers at the time of tender of the lawsuit corroborated this factual allegation. According to the police report, Komin's own account of events confirmed that he pushed both Bob and Carol Grayson onto the ground in the front yard. Approximately six months after Travelers denied coverage based in part on the allegations in the Grayson lawsuit and Komin's statement to the police as recorded in the police report, Komin's attorney sent a letter to Travelers indicating Komin's position that Carol Grayson sustained her injury when she tried to take a swing at him and fell. The same assertion was made in Komin's declaration in opposition to the motion for summary judgment, including his clarification that he never pushed or touched Carol Grayson.

According to Komin, the evidence provided to Travelers that Carol Grayson took a swing at Komin and lost her balance showed that her hand injury potentially came within the coverage for accidents, since her fall (and injury to her hand) was arguably not directly caused by his intentional conduct. Even considering the evidence presented in opposition to the summary judgment motion, which was proffered long after the time the

Grayson lawsuit was tendered by the insured, we find Komin's argument unpersuasive for the reasons explained below.

In addressing this issue, we keep in mind that the term "accident" in a policy's coverage clause "refers to the injury-producing acts of the insured, not those of the injured party." (*Delgado, supra*, 47 Cal.4th at p. 315.) "Under California law, the word 'accident' in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured. [Citations.] This view is consistent with the purpose of liability insurance." (*Id.* at p. 311.)

Here, even accepting Komin's later version of events that he did not push Carol Grayson to the ground, it appears to be undisputed that Komin had intentionally engaged in an altercation with Bob Grayson and/or had been "subduing" him through force, all in Carol Grayson's presence. If, as might be expected, Carol Grayson sought to intervene on behalf of her husband and even took a swing at Komin, the fact that she may have stumbled in her attempt to hit Komin would not convert Komin's intentional and purposeful conduct—the forceful or assaultive conduct at the crux of the Graysons' allegations—into a covered accident. In other words, the fact that Carol Grayson may have caused her own wounds by intentionally assaulting Komin would not create a covered accident. On this record, it simply cannot be said, *with reference to the relevant conduct of the insured*, that either *his* neglect or a fortuitous accident on *his* part somehow led to Carol Grayson's injury. Rather, the gravamen of Carol Grayson's claim, as confirmed by the extrinsic evidence known to the Travelers's adjuster, was plainly that of intentional assault, battery or physical force deliberately carried out by Komin, with concomitant injuries arising from that tense altercation. We conclude that for purposes of the coverage issue in this case, nothing in Komin's declaration materially changed the tenor of Carol's Grayson's claim or the intentional nature of Komin's course of conduct, even if he correctly believed his deliberately forceful actions were justified and limited.

In his appeal, Komin suggests it was hypothetically possible that Carol Grayson's injuries were caused by "the texture of the stucco wall, the proximity of the lawn to the stucco wall or some object inadvertently left in the lawn." However, none of these theories was alleged by the parties or suggested by the extrinsic facts. We therefore reject this line of argument. "An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date.… 'A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage.'" (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114 (*Gunderson*).) Furthermore, speculation cannot defeat a summary judgment motion; actual responsive evidence is required. (Code Civ. Proc., § 437c, subds. (b)(3), (p)(2); *Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481 [opposing party cannot controvert moving party's evidence by mere speculation]; *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 [same].)

Finally, we note that even assuming Carol Grayson may have contributed to her own physical injury by her conduct, that fact alone would not potentially create coverage in this unique case. Again, in deciding whether an accident occurred under the liability policy, the focus is on the insured's conduct for which liability is sought to be imposed against the insured. (*Delgado*, *supra*, 47 Cal.4th at p. 311.) Thus, even if Carol Grayson may have injured herself by taking a swing at Komin, losing her balance and falling, that possible scenario would not change the essential nature of the claim against Komin—based wholly on Komin's intentional or deliberate conduct—for purposes of Travelers's duty to defend. *That* conduct alone was the conduct for which liability was sought to be imposed against Komin. At most, Komin's assertion in his declaration that Carol Grayson lost her balance while trying to take a swing at him might have indicated a damage calculation issue relevant to Carol Grayson's intentional assault and battery cause of action in the trial of the Grayson lawsuit, or a basis for negating such damages

against Komin, but in this case it was wholly insufficient to create a potential basis for coverage.[8] The crux of the matter, for purposes of coverage, remained *entirely* Komin's intentional conduct.

Based on the foregoing, we conclude that when each of the Graysons' distinct claims are scrutinized individually, along with the extrinsic facts known to the insurer, none of those claims indicate there was a potential basis for coverage under the liability policy. The same is true even if we consider Komin's declaration in opposition to the summary judgment motion. Accordingly, Komin's mixed-action argument for coverage fails.

B. Asserted Lack of Thoroughness of Travelers's Investigation

Despite the fact the motion for summary judgment established Komin's intentional conduct, and not an accident or neglect on Komin's part, was the operative basis for the Graysons' claims, Komin argues that Travelers's motion nevertheless should have been denied based on an asserted failure by Travelers to conduct a more thorough investigation into whether a duty to defend existed. For reasons explained below, we disagree.

To reiterate, an insurer's duty to defend depends, in the first instance, on a comparison of the allegations of the complaint and the terms of the policy. (*Hartford, supra*, 59 Cal.4th at p. 287.) It also depends on whether extrinsic facts known to the insurer suggest the claim may be covered. (*Ibid*.) Generally, the relevant extrinsic facts would be those known to the insurance company at the time of tender of the claim for coverage. (*Ibid*.) Further, "an insurer does not have a continuing duty to investigate whether there is a potential for coverage. If it has made an informed decision on the basis

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[8] Additionally, whether Carol Grayson's fall in trying to intervene was due to Komin's push or her own stumble in taking a swing at Komin, her effort to step into the fray where her husband was being subdued would not be viewed as something independent of or unconnected to Komin's intentional course of conduct for purposes of deciding the coverage issue (see *Actavis, Inc., supra*, 16 Cal.App.5th at p. 1038 [no accident where insured performs deliberate act unless there is some """"additional, unexpected, independent, and unforeseen happening""" that produces the damage]).

of the third party complaint and extrinsic facts *known* to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the lawsuit." (*Gunderson, supra,* 37 Cal.App.4th at p. 1114.)

As we have discussed above, Travelers considered the allegations in the Grayson lawsuit and the extrinsic facts known to it at the time Komin tendered coverage, and even afterwards. Moreover, by making inquiries and gathering information beyond the allegations of the Grayson lawsuit, it is clear that Travelers *did* conduct an investigation, as was clearly presented in its motion for summary judgment. The extrinsic evidence reviewed by Travelers included the police report and witness accounts summarized therein (including statements by Komin, the Graysons and two neighbors), a summary of a video recording of the incident, and Roxann Komin's description of events by telephone. Further, as Komin was a represented party, Travelers repeatedly sought his version of events from his attorney. According to Travelers's adjuster, Komin's attorney initially indicated he did not have any additional facts for Travelers to consider. Later, in his August 14, 2012 letter, Komin's attorney provided a revised version of events from what was set forth in the police report. Travelers considered all of the information known to it in determining there was no potential for coverage. Based on the principles of law outlined above, that was all that was required.

To support its theory that a more thorough investigation was required, Komin cites *Eigner v. Worthington* (1997) 57 Cal.App.4th 188. However, that case is clearly distinguishable. In *Eigner*, the insurer refused to defend its insured based solely on its review of the language of the policy and allegations of the third party complaint even though the complaint, on its face, should have alerted the insurer of the need to investigate further. (*Id*. at p. 198.) On those facts, the Court of Appeal held the insurer had not shown sufficient "'surprise'" to justify relief under Code of Civil Procedure section 473, subdivision (b). (*Eigner, supra,* at pp. 199–200.) Nothing in *Eigner* purported to alter the basic rule that an insurer considers the allegations of the complaint

and known extrinsic facts in making its coverage decision. Additionally, here, unlike the situation in *Eigner*, the Grayson lawsuit did not on its face indicate that further investigation would likely reveal potential coverage.

Komin also seizes upon the fact that some cases refer to an insurer's duty to consider "available" extrinsic facts. That argument is likewise unpersuasive because, in context, the cited cases appear to use the term "available" facts as generally synonymous with "known" facts. (See, e.g., *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654–655, 657; *Gunderson, supra,* 37 Cal.App.4th at p. 1114.) Therefore, the occasional usage of alternate wording was not intended to create a new rule of law. In any event, it does not appear that Travelers is advocating a position that it was entitled in this case to sit by passively and rely solely on the pleading, without any effort to ascertain or consider the extrinsic facts. (See, e.g., *CNA Casualty of California v. Seaboard Surety Co*. (1986) 176 Cal.App.3d 598, 610 [insurer's duty to defend may arise from extrinsic facts]; cf. *Egan v. Mutual of Omaha Ins. Co*. (1979) 24 Cal.3d 809, 817–819 [noting investigation needed in first party claims].) Rather, as noted, Travelers *did* engage in an investigation of extrinsic facts that clearly confirmed the intentional nature of Komin's conduct.

Concerning Travelers's investigation, it appears that Komin's primary argument in a nutshell is this: Travelers's investigation was defective because its adjuster did not personally interview Komin (or more fully interview his wife) before denying coverage. In this unique case, we conclude that Komin has failed to show there was an investigation problem on Travelers's end. To repeat, Travelers reviewed not only the allegations of the Grayson lawsuit, but also the extrinsic information provided in the police report, including the contemporaneous accounts indicated therein of what the witnesses told the police about what happened. It is difficult to overstate the strength of the extrinsic evidence reflected in the police report in confirming Komin's intentional conduct. As noted, according to the police report, Komin "admitted he pushed [Bob] Grayson, Sr. and

Carol into the front yard and they fell down." Additionally, although Komin denied kicking Bob Grayson while he was on the ground, Komin "admitted brandishing his shotgun," stating the Grayson family would not leave his property and he had a right to defend his home. Bob and Carol Grayson gave their statements to police, reporting Komin's acts of physical assault and battery and brandishing a shotgun with threatening words. Two nonparty neighbors, George and Barbara, gave statements to the police that substantially corroborated the Graysons' accounts of Komin's actions.

Moreover, Travelers's adjuster did not ignore or fail to seek information from the Komins. The adjuster called and discussed the incident with Komin's wife and communicated with Komin's attorney, all in an effort to receive information bearing on the coverage decision from the Komins. Subsequently, based on the complaint as well as the extrinsic facts, Travelers's adjuster sent the denial letter explaining why there had been no "occurrence" and, therefore, no coverage existed, since Komin's operative conduct was intentional. Travelers's denial letter clearly put the Komins on notice that Travelers understood the Grayson lawsuit and known extrinsic facts reflected only intentional, deliberate, nonaccidental conduct. Moreover, Travelers requested in their denial letter to be advised of any facts that would be relevant to the duty to defend determination. Indeed, the record shows that Travelers invited Komin or his counsel to provide any additional facts that could support coverage on at least five separate occasions.

On this record, Komin has failed to demonstrate error concerning the trial court's order granting summary judgment, which order was on the ground there was no duty to defend in light of Komin's conduct at issue being intentional, not an accident. Nothing in Komin's arguments about a theoretical duty to investigate further changes the validity of the trial court's basis for granting the motion. In any event, even if hypothetically, a further investigation was required in this case, the matters revealed in the Komins' declarations of what they would have told the adjuster if they had been specifically asked

were, in essence, that Komin acted the way he did in self-defense, that Komin did not kick Bob Grayson when he was down, and that Carol Grayson was not pushed by Komin but fell while trying to take a swing at Komin. As discussed above, such assertions would not have created coverage in this case.

C. Graysons' Amendment Adding Negligence Label

Komin contends that the Graysons' decision on the eve of trial to briefly add causes of action labeled negligence in a second amended complaint created a duty to defend. We disagree. The second amended complaint did not present any new facts, and the only change was the addition of conclusory boilerplate allegations of negligence and negligent infliction of emotional distress. The law is clear that adding the label of negligence to factual allegations showing intentional conduct does not create coverage. "'[C]overage turns not on "the technical cause of action pleaded by the third party" but on the "*facts* alleged in the underlying complaint" or otherwise known to the insurer. [Citation.] A general boilerplate pleading of "negligence" adds nothing to a complaint otherwise devoid of *facts* giving rise to a potential for covered liability. [Citation.]'" (*Gonzalez v. Fire Ins. Exchange*, *supra*, 234 Cal.App.4th at p. 1235; accord, *Swain v. California Casualty Ins. Co*., *supra*, 99 Cal.App.4th at pp. 8–9.)

D. Komin's Exoneration in the Underlying Lawsuit

Komin also contends that because he prevailed in the underlying Grayson lawsuit, it means the incident was potentially covered after all. We disagree. The jury's conclusions in the underlying case would only indicate that the Graysons failed to convince the jury of their claims based exclusively on Komin's alleged intentional conduct. The case went to trial on the intentional tort claims and the jury found Komin did not perpetrate the alleged intentional conduct. Nevertheless, as Travelers points out, the issue was never whether the Graysons' claims had merit or would ultimately succeed, but whether such claims revealed a potentially covered occurrence. In short, Komin's

exoneration at trial of intentional wrongdoing did not establish that there was a potentially covered claim.[9]

E. Argument Based on Trial Court's Evidentiary Objections

Finally, Komin argues the trial court made errors regarding evidentiary rulings. We review the trial court's evidentiary rulings for abuse of discretion, and we interfere with the lower court's judgment only if the party can show that no judge could reasonably have made the same ruling (*O'Neal v. Stanislaus County Employees' Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1199; accord, *Alexander*, *supra*, 23 Cal.App.5th at p. 226) and prejudice or a miscarriage of justice occurred as a result (Evid. Code, § 354).

1. Objections to the Komins' Declarations

In his declaration in opposition to the motion for summary judgment, Komin related the version of events he would have provided to Travelers had he been directly interviewed by Travelers. Travelers objected on the ground the declaration was irrelevant and immaterial, and the trial court sustained the objections. According to Travelers, the trial court did not abuse its discretion because (1) the only relevant facts were the allegations in the complaint and extrinsic facts known to Travelers at the time the Grayson lawsuit was tendered and (2) Travelers already had Komin's version of events in the police report as well as his later version of events as set forth in Komin's attorney's August 2012 letter. We find it unnecessary to decide the merits of the trial court's evidentiary ruling on the relevance of Komin's declaration because, as we have discussed within this opinion, even if the declaration had been considered, it would not have established a potential for coverage of the Grayson lawsuit.

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9 At oral argument, Komin's counsel reiterated this argument by asserting that the jury's decision is binding on Travelers. Whatever is meant by this general assertion, Komin has continued to fail to explain how the jury decision would establish coverage in the absence of an accident as defined under *Delgado*. We therefore reject this line of argument.

In her declaration in opposition to the summary judgment motion, Roxann Komin also related the version of events she claims she would have provided to Travelers had she been properly interviewed. She admitted to having a telephone conversation with a woman at Travelers but said the woman did not ask her any questions about what happened. Roxann's declaration included statements to the effect that her husband did not ever strike or kick Bob Grayson and did not touch Carol Grayson, but that Carol Grayson tried to take a swing at her husband and lost her balance. Travelers objected on the ground of irrelevance and on the ground the declaration contradicted Roxann's own deposition testimony. The trial court sustained the objections.

To begin with, we conclude the trial court did not abuse its discretion in sustaining the objection to the portion of Roxann Komin's declaration where she states that the woman at Travelers never asked her about the incident or about what happened. As Travelers argues, the objection was properly sustained because Roxann's statements contradicted her prior deposition testimony that she could not recall her conversation with Travelers's adjuster. We agree with that assessment. In her deposition, Roxann repeatedly stated she did not recall the conversation, although she affirmed the facts set forth in the adjuster's telephone notes were otherwise accurate. Despite her lack of recollection as indicated in her deposition testimony, Roxann Komin's declaration in opposition to the motion for summary judgment asserted what did and did not happen in the conversation she previously could not remember. A party cannot create a triable issue of fact by providing a declaration that contradicts his or her prior deposition testimony. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12; *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860–861; see also *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1493, fn. 4 ["As a general rule, declarations lodged at a hearing on a motion for summary judgment that are inconsistent with evidence obtained in the course of discovery are to be disregarded."].) Based on the foregoing, we conclude

the trial court did not abuse its discretion in sustaining the objections to the portion of Roxann's declaration describing her conversation with Travelers's adjuster.

The remainder of Roxann Komin's declaration is essentially the same as the declaration submitted by Komin in describing what happened in the altercation. As was the case with Komin's declaration, we find it unnecessary to decide the merits of the remaining evidentiary objections to Roxann's declaration because, as we have discussed within this opinion, even if such evidence had been considered by the trial court, it would not have established a potential for coverage of the Grayson lawsuit.

2. Declarations of Komin's Attorney and His Expert Witness

Komin's attorney in the underlying Grayson lawsuit, Gregory Hulbert, submitted a declaration in opposition to the motion for summary judgment. Among other things, Hulbert's declaration asserted that although Travelers knew he was representing Komin, he (Hulbert) was never informed "that Travelers wished to speak with … Komin about the facts that gave rise to the lawsuit." Travelers objected based on lack of relevance and that the statement misrepresented the record, and the trial court sustained the objections. Whether or not Hulbert's declaration was objectionable, we conclude it did not create a triable issue. The record established that by telephone and letters, Travelers sought information through Hulbert about facts bearing on coverage.

Finally, Komin submitted a declaration from his claims handling expert, Thomas Corridan. Travelers objected on multiple grounds to Corridan's declaration, including that it provided improper legal opinions regarding ultimate legal issues, lacked foundation, mischaracterized the record, was argumentative, and was based on conjecture. The trial court sustained the objections. We find no abuse of discretion. The declaration in question was replete with opinions about what the law requires, or of the expert's own opinion about how ultimate legal issues should be decided. These were clearly issues for the court to resolve. It is well settled that experts may not give opinions on legal matters that are essentially within the province of the court to decide. (*Sheldon*

Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 884; see *Devin v. United Services Auto. Assn*. (1992) 6 Cal.App.4th 1149, 1157–1158, fn. 5 [explaining that claims handling expert may not opine about legal questions, including whether the insured was entitled to a defense under policy language].) The expert's declaration included his conclusory opinion that an insurer must always undertake a "full" investigation, including always speaking with the insured directly, and that a failure to do so would constitute a breach of the insurer's duties. This too overstepped the expert's role by opining on the legal issue of duty and was objectionable as being overly general and conclusory. (See *Nager v. Allstate Ins. Co*. (2000) 83 Cal.App.4th 284, 292, fn. 4 [summary judgment affirmed despite expert's declaration that "'an absolute breach'" of the insurer's duties occurred]; *Benavidez v. San Jose Police Dept*., *supra*, 71 Cal.App.4th at p. 865 [courts must be cautious where an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion].) Although the matter of the admission of expert evidence is within the sound discretion of the trial court (see *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 924), Komin has failed to show the trial court's exclusion of this particular declaration constituted an abuse of discretion.

Based on the foregoing discussion, we conclude the trial court properly granted summary judgment in favor of Travelers.[10] In light of that conclusion, we find it unnecessary to consider the additional arguments relating to the trial court's alternative ruling granting summary adjudication.

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10 During oral argument of this appeal, Komin's counsel urged that we consider *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, a summary judgment case in which the Supreme Court reversed the lower court's decision that no duty to defend existed. We have done so and find it to be distinguishable. In that case, unlike here, there was more than the insured's intentional acts involved, but other conduct on the insured's part was alleged to have negligently caused harm. (*Id*. at pp. 1082–1083.) Therefore, unlike here, a potential for coverage existed.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Travelers.

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MEEHAN, Acting P.J.

WE CONCUR:

_____
SNAUFFER, J.

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DESANTOS, J.